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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-939

DELAWARE STATE COLLEGE, *et al.*,
Petitioners,

v.

COLUMBUS B. RICKS,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC"), with the consent of all parties, respectfully submits this brief as Amicus Curiae.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of

sound government policies, procedures, and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique competence and understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981 and the various other Federal orders and regulations pertaining to nondiscriminatory employment practices. As such, they have a direct interest in the issues presented for the Court's consideration in this case.

As a significant part of its activities, EEAC has participated as amicus curiae in a number of cases before this Court which involved specifically the interpretation of its filing requirement, 42 U.S.C. § 2000e-5(e) (hereinafter "section 706(e)"), the statutory provision of primary concern here. See *United Air Lines* v. *Evans*, 431 U.S. 553 (1977). *See also, California Brewers Association* v. *Bryant*, 22 FEP Cases 1 (U.S. Feb. 20, 1980); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *Mohasco Corp.* v. *Silver*, —— U.S. ——, No. 79-616; *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977); and *Electrical Workers* v. *Robbins & Meyers, Inc.*, 429 U.S. 229 (1976).

SUMMARY OF ARGUMENT

The Amicus submits that the Third Circuit's ruling that the plaintiff complied with Section 706(e) of Title VII, which requires as a prelude to suit that a charge be filed with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discriminatory act, is directly contrary to this Court's ruling in *United Air Lines* v. *Evans*, 431 U.S. 553 (1977). *Evans* holds that a "discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed . . . , an unfortunate event in history which has no present legal consequences." *Id.* at 558. "Mere continuity," this Court declared, is legally insignificant absent a "present *violation*." *Id.* (Emphasis in original.)

There is no allegation in the record before this Court of an act of discrimination occurring within 180 days of the plaintiff filing his charge. The act complained of, the denial of tenure accompanied by a terminal one-year contract, occurred ten months before his filing, and thus his action is time-barred. The Third Circuit's attempt to distinguish and limit *Evans* as applicable only to cases where a plaintiff has been terminated from employment for more than 180 days has no basis in the language or logic of this Court's decision. At the same time, the circuit court's formulation of a "continuing violation" theory to preserve all claims of employment discrimination arising during the employment relationship until 180 days after termination distorts Title VII's time limitation period beyond recognition and insures the proliferation of stale claims in the federal courts.

Inherent in the Third Circuit's misconstruction of Title VII's time limitation is a perpetuation theory wholly at odds with the Title VII policy that favors limiting the life of claims. Virtually all forms of alleged employment discrimination, if proven, have a consequential, and to that extent, continuing impact on their victims. Indeed, were plaintiff's claims proved, he might well be able to show his denial of tenure has resulted and will continue to result in consequences to his career extending for years. But the teaching of this Court's decision in *Evans* and *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), unequivocally establishes that continuing impact alone does not insulate alleged acts of discrimination from the necessity for timely challenge. By allowing plaintiff's claim of unlawful discrimination on the basis of tenure denial to languish until his complete termination from employment, the Third Circuit not only resurrects "continuing impact" as a determinant for extending the life of claims, but does so arbitrarily by basing actionability for remote discriminatory acts on the continuing employment relation between the parties, a notion that would render nugatory the limitations period for filing.

The Third Circuit defended its use of the employment termination date as calculated to reduce the possibility of litigation by giving persons "in academia as well as in the business community" an opportunity to change their minds about employment-related decisions. But disregarding the clear import of Section 706(e) and casting aside the well-established precedent of this Court should not be excused

on such novel, and speculative grounds. This Court has indicated that the time limitation requirement in Title VII constitutes nothing less than a jurisdictional prerequisite to filing suit and has admonished that courts lack power to alter the filing period by deferral to other remedies. *Electrical Workers* v. *Robbins & Meyers, Inc.*, 429 U.S. 229 (1976). In any event, the circuit court's policy, if left intact, would foster the litigation of stale claims by giving an employee a "blank check" to bring suit on a discrete act of alleged discrimination perhaps years after the event, so long as he remains in the employ of his prospective defendant. Such a policy would encourage speedy employee discharges rather than facilitate the expeditious resolution of Title VII claims, which is the purpose behind the time limitation requirement.

ARGUMENT

THE COURT OF APPEALS ERRED IN FINDING A REMOTE ALLEGED DISCRIMINATORY ACT ACTIONABLE UNDER TITLE VII SOLELY ON THE BASIS OF A CONTINUING EMPLOYMENT RELATIONSHIP BETWEEN THE PARTIES

The district court made a finding below that plaintiff's Title VII claim is based on the decision of the defendant denying him tenure and awarding him a one-year contract during the spring of 1974[1]—a finding that was left undisturbed in the

[1] "I conclude," stated the district court, "that the alleged violation occurred when the Board of Trustees denied the plaintiff tenure and awarded him a terminal contract." Cert. Pet. at 30a. "At oral argument," noted the court, "plaintiff's counsel made it clear that the only acts upon which the plain-

court of appeals. Furthermore, it is uncontested on the record before the Court that plaintiff did not file his charge with EEOC until approximately ten months after the decision denying him tenure, well after the 180-day limit for filing a Title VII-based charge with the EEOC had expired.[2] Nevertheless, the court of appeals reversed the district court's dismissal of plaintiff's claim on the basis that the 180-day period for filing a Title VII charge does not begin to run "until the employer has made a final decision to terminate [the employee], *and the em-*

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tiff relies to bring his case within the statutory period are those relating to the denial of tenure and the termination of his employment." Cert. Pet. at 28a.

[2] The applicable statutory provision reads:

> A charge under this Section shall be filed within 180 days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charges are made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person within 300 days after the alleged unlawful employment practice occurred, or within 30 days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the state or local agency. 42 U.S.C. § 2000e-5(e) (1976).

The failure to comply with state filing requirements is not in issue here.

ployee ceases to render further services to the employer." (Emphasis in original.) The Amicus submits that the court of appeals' interpretation of the time limitation requirement in Title VII squarely contravenes the Court's decision in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), as well as the thrust of the Court's reasoning in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), and *Electrical Workers* v. *Robbins & Meyers, Inc.*, 429 U.S. 229 (1976).

In *Evans*, it will be recalled, the plaintiff, a female flight attendant, filed a sex discrimination claim grounded upon the employer's unwillingness to credit her with seniority accumulated between 1968, when she was terminated pursuant to a policy (subsequently declared unlawful) against marriages, and 1972, when she was hired as a new employee. In arguing that the employer had engaged in a continuing violation of Title VII, plaintiff contended that the seniority system gave present effect to the employer's past unlawful act. The Court rejected this contention on the basis that plaintiff's claim, not having been filed within the time prescribed by the statute, was stale. Thus, the Court explained:

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

431 U.S. at 558.

The Court then addressed specifically plaintiff's allegation of a continuing violation: "[Plaintiff] emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists." *Id.* (emphasis in original). By these words, the Court acknowledged that both remote and current acts of discrimination can have an effect on a discriminatee, but that only charges filed within 180 days of the alleged discriminatory act can support a timely claim.

The Court's analysis in *Evans* of "continuing impact" and its recognition of the inappropriateness of relying upon such impact to measure timely filing under Title VII are directly on point with the facts of this case.[3] The acts alleged here by the plaintiff to be

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[3] The facts of the instant case may present even more compelling reasons for rejecting the continuing violation theory than did *Evans*. Thus, while both cases concern charges of individual discrimination, *Evans* also involved a company policy that as a matter of law had been found discriminatory, *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). Since *Evans* would hold nonactionable a company *policy* of discrimination that has been discontinued more than 180 days before the filing of a charge, this only underscores the remoteness of the isolated alleged discriminatory acts here. Whether *Evans* may still permit a timely filing on the basis that a defendant has committed a *remote* discriminatory *act* and maintains a *present* discriminatory *policy*, is not in issue here, for no discriminatory policy has been alleged. *Cf.*, *Goldman* v. *Sears*, 607 F.2d 1014, 1018 (1st Cir. 1979), *cert. denied*, 48 U.S.L.W. 3598 (U.S. March 18, 1980).

discriminatory occurred well over 180 days previous to his filing a charge. The *only* circumstance acknowledged by the court of appeals as extending the alleged violation is the existence of a continuing employment relation. Notwithstanding the circuit court's novel characterization of plaintiff's termination as "continuing," this is but another way of saying that the remote discriminatory act continues because the discriminatee is still employed—a notion indistinguishable from the continuity-of-effect theory rejected by the Court in *Evans*. *See also, Martin* v. *Georgia Pacific Co.*, 568 F.2d 58, 62 (8th Cir. 1977) (plaintiff's Title VII claim time-barred, per *Evans*, despite employee's current employment); *see generally*, Jackson and Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 Geo. L.J. 811, 821-22 (1979).

Evans, of course, concerned the impact of a commercial seniority system, whereas here an academic tenure decision is involved. Through the enactment of a specific provision, Section 703(h), Congress sought to preserve employee's seniority expectations as embodied in various seniority systems. Because that section is limited neither to private businesses nor to seniority arrangements collectively bargained,[4]

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[4] The applicable statutory provision reads:

> (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not

principles established under Section 703(h) may apply here. To the extent they do, the untimeliness of plaintiff's claim is that much more evident.

In *International Board of Teamsters* v. *United States*, 431 U.S. 324, 353-54 (1977), the Court held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." Although the question of a timely filing was not raised, the Court declared that by "both the literal terms of § 703(h) and the legislative history of Title VII," Congress had "extended a measure of immunity" to systems that " 'operate to 'freeze' the status quo of prior discriminatory employment practices.' " *Id.* at 350. The Court thereby made clear that while both past and present acts can have present discriminatory effects, only present discriminatory effects are actionable. In the case at bar, plaintiff alleges, at most, a "past" discriminatory act which, even if it has present consequences, does not incorporate a

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the result of an intention to discriminate because of race, color, religion, sex, or national origin; nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid to employees of such employer if such differentiation is authorized by the provisions of Section 6(d) of the Fair Labor Standards Act of 1938 as amended (29 USC 206(d)).

42 U.S.C. § 2000e-2(h) (1976).

present discriminatory decision giving rise to present discriminatory effects which, under both *Teamsters* and *Evans*, is a *sine qua non* to a viable Title VII claim.

Whether or not principles associated with Section 703(h) come into play here, however, the Court's opinion in *Evans* makes plain that the requirement of a present violation is applicable to all Title VII suits and not only to those relating to seniority cases. This is manifest in that the Court addressed currently operated neutral *systems*, and did not even address Section 703(h) until after it had disposed of the case on the merits, stating subsequently that the section "provide[d] an additional ground for rejecting [plaintiff's] claim." 431 U.S. at 560. The Court thus made unequivocally clear that only discriminatory decisions currently rendered are actionable irrespective of the employment setting, and that so long as the employment system under review is not *presently* discriminating against the plaintiff, a remote discriminatory act constitutes nothing more than "an unfortunate event in history which has no present legal consequences." *Id.* at 558. Accordingly, the Ninth Circuit has followed the principles established in *Evans* by ruling, in the context of an academic tenure case, that the "proper focus" for determining timeliness of filing under Title VII "is upon the time of the discriminatory acts (*i.e.*, final tenure decision), not upon the time at which the consequences of the acts become most painful." [5]

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[5] *Abramson* v. *University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979)

Cf., *Jacobs* v. *Board of Regents*, 21 FEP Cases 1656, 1659 (S.D. Fla. 1979) ("the discharge . . . of an employee is a

The court of appeals' holding that a continuing employment relation keeps alive what would otherwise be an untimely Title VII claim is contrary to the logic, as well as to the law of *Evans*. By measuring the 180-day time limit from the date of the alleged discriminatory act, all Title VII plaintiffs are placed on an equal footing. As commentators have pointed out, allowing for a continuing employment relationship to extend the time limit "could produce the anomalous result of granting relief to parties suffering less harm—putative promotees—while denying relief to parties suffering greater harm —putative hirees or dischargees." Jackson and Matheson, *supra*, 67 Geo. L.J. at 822. More fundamentally,

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discrete act of discrimination that does not rise to the level of continuing discrimination"). The reliance by the circuit court below upon case law in the Second Circuit purportedly in accord with its own view of "continuing violation" is misplaced. In *Egelston* v. *State Univ. College*, 535 F.2d 752 (2d Cir. 1976), the court found that plaintiff had alleged acts of sex discrimination within the 180-day filing period. Moreover, the plaintiff in that case alleged that the discrimination against her was not an isolated act, but constituted a part of the college's "continuing policy to deny women access to its upper echelons." *Id.* at 755. Whatever the viability of a "continuing violation" theory where present discrimination policies are alleged, *cf.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971) (proscribing employment practices "fair in form, but discriminatory in operation") no such allegation has been made here, and the circuit court below has eschewed any reliance upon the notion of a continuing discriminatory *policy* as perpetuating plaintiff's claim. See note 2, *supra*. Contrary to the Third Circuit's characterization of its sister circuit's case law, the Second Circuit in fact has been very strict in applying the 180-day filing requirement, terming it a "necessary prerequisite" to suit under Title VII, *Smith* v. *American President Lines, Ltd.*, 571 F.2d 102, 105 (2d Cir. 1978).

since employment relations often exceed six months, "to base actionability on this theory would render the statutory filing requirement hollow in many cases." *Id. Accord, Cisson* v. *Lockheed-Georgia Co.*, 392 F. Supp. 1176, 1181 (N.D. Ga. 1975) (broad extentions of continuing violation theory might eliminate filing requirement entirely); *Gorden* v. *Baker Protective Services, Inc.*, 358 F. Supp. 867, 869 (N.D. Ill. 1973) ("If an alleged violation is deemed to be 'continuing' the statutory period is of little practical effect").

The court of appeals overlooks these glaring gaps in the logical structure of its rationale, choosing instead to concentrate solely on promoting a theory which, in its view, will encourage dispute settlement by permitting time for a reconsideration, and perhaps a reversal of potentially actionable employment decisions. The court of appeals thus surmises that "in academia as well as in the business community, decisions are often changed and it is not desirable to encourage the initiation of litigation that might thwart any internal processes of conciliation and reconsideration." 605 F.2d at 712. The court's reasoning, however, disregards the strong likelihood that such a policy, would, in fact, foster the litigation of stale claims. Free from the need to act in accordance with time restraints so long as there is no discharge, the circuit court's policy would give an employee a "blank check" to bring suit on a discrete act of alleged discrimination perhaps years after the event. Faced with uncertainty over the impact of its personnel policies and practices, employers hardly would be encouraged to seek settlement of disputes that, no matter how remote in time, could arise again in the form of a Title VII suit upon termination of

an employee. To the contrary, where disputes arose employers would be encouraged to terminate an employee as quickly as possible for fear that the employee might carry his cause of action with him throughout his employment.

These practical flaws in the circuit court's rationale can be traced to a fundamental error of law in the way it views the availability of alternative remedies for alleged employment discrimination. In framing a procedure the purpose of which is to allow other avenues of redress for employee complaints to operate without prejudicing the opportunity for subsequent filing of a claim pursuant to Title VII, the circuit court overlooks this Court's strict admonition that courts lack power to alter the congressionally established length of the filing period by deferral to independent remedies.

In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 52 (1974) (per curiam), the Court established that rights under a collective bargaining agreement and under Title VII "have legally independent origins and are equally available to the aggrieved employee." This principle of independent remedies was extended to separate statutory schemes in *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), in which the Court held that the filing of a charge under Title VII does not toll the statute of limitations of an action, based on the same facts, brought under 42 U.S.C. § 1981.

This line of cases culminated in *Electrical Workers* v. *Robbins & Meyers, Inc.*, 429 U.S. 229 (1976), in which an employee sought relief from allegedly discriminatory treatment through the grievance procedures of a collective bargaining agreement, but failed

to file a charge with the EEOC within what was then the 90-day time limit set forth in the statute. The Court viewed the independence of alternative remedies as so critical that it spoke of Title VII's filing requirement in jurisdictional terms, thereby expressing disfavor with notions even of equitable tolling:

> Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision,' *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 47, ... Congress did not leave to courts the decision as to which delays might or might not be 'slight.'

429 U.S. at 240. *See also, McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973) (filing timely charge of employment discrimination with EEOC a "jurisdictional prerequisite" to federal action).

In accordance with these views, the district court in *Evans* dismissed the plaintiff's complaint on the ground that it had no jurisdiction of a time-barred claim, a ruling which this Court noted specifically in its opinion in *Evans*. See 431 U.S. at 556, n.8.

The opinion of the circuit court stands in stark contrast to this Court's emphasis upon the independence of alternative remedies to employment discrimination, and the significance placed upon the strict time limits for filing under Title VII. Oblivious to the likelihood of unfair surprise and the revival of stale claims which its ruling would promote, the

court of appeals fashioned a rule which would preserve causes of action under Title VII far beyond six months and well into a future where evidence has been lost, memories have faded, and witnesses have disappeared.

As the right to be free of stale claims must ultimately prevail over the right to prosecute them, *Order of R. R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944), so the court of appeals' continuing employment relation test must be struck down as virtually eliminating the limitations period for filing and inevitably exposing defendants to the assertion of stale claims.[6]

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[6] In contrast to the circuit court's opinion below, other federal courts have acknowledged that the time requirements set by Congress are designed to safeguard defendants, as well as agencies and courts, from stale claims. See *Gautam* v. *First National City Bank*, 425 F. Supp 579, 585 (S.D. N.Y. 1976), *aff'd mem.*, 575 F.2d 1290 (2d Cir. 1977); *see also, Loo* v. *Gerarge*, 374 F. Supp. 1338, 1340 (D. Hawaii 1974) (isolated and completed acts against a particular subjective viewpoint of the aggrieved "do not give the Plaintiff a perpetual right to file charges before the EEOC."); *Hickman* v. *Queen*, 15 FEP Cases 953, 955 (S.D. Ohio 1976).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that plaintiffs' claims are time-barred and that the judgment of the court of appeals should be reversed with instructions to reinstate the district court's order of dismissal.[7]

Respectfully submitted,

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[7] For the reason set forth in our main Argument, the Amicus further submits that the court of appeals erred in determining that the statute of limitations for purposes of 42 U.S.C. § 1981 did not begin to run until plaintiffs' employment ceased. Therefore, if the question of timeliness under Section 1981 is reached by the Court, that ruling must be struck down in order to avoid conflicts between Title VII and Section 1981. *Chance* v. *Board of Examiners*, 534 F.2d 993, 998 (2d Cir. 1976), *mod. on other grounds*, 534 F.2d 1007 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Waters* v. *Wisconsin Steel Workers*, 502 F.2d 1309, 1316 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

The Court, however, may not wish to reach the Section 1981 timeliness issue, as the district court below did not rule on whether plaintiff's national origin discrimination claim is cognizable under Section 1981, and the court of appeals did not address the issue of cognizability, leaving it to the district court on remand to make a determination on this issue. In any event, it is doubtful whether a claim of national origin discrimination is cognizable under § 1981. *See e.g.*, *Kurlyas* v. *U.S. Dep't of Agriculture*, 373 F. Supp. 1972 (D.D.C. 1974), *aff'd*, 514 F.2d 894 (D.C. Cir. 1975). *Cf. Manzanares* v. *Safeway Stores*, 19 FEP Cases 191, 192-93 (10th Cir. 1979).